



**FRIENDS OF THE RIVER**

**1418 20TH STREET, SUITE 100**

**SACRAMENTO, CA 95811**

March 14, 2016

Via Email and U.S. Mail

The Honorable Sally Jewell  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, D.C. 20240

The Honorable Gina McCarthy,  
Administrator  
U.S. Environmental Protection Agency  
WJC North, Room 3,000 1101A  
Washington, D.C. 20460

The Honorable Penny Pritzker  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, D.C. 20230

Christina Goldfuss, Managing Director  
Council on Environmental Quality  
The White House  
Washington, D.C.

Additional Addressees listed  
at end of letter

**Re: Request that All Federal Officers and Employees Honor President Obama's Promise that Federal Scientific agencies and scientists will Not be Suppressed, in this case, in their review of the BDCP/California Water Fix Delta Water Tunnels Project proposal**

**Dear Secretary Jewell, Secretary Pritzker, Administrator McCarthy, Director Goldfuss, and all Federal Agencies and Officers Carrying out and Reviewing the BDCP/California Water Fix under the Endangered Species Act:**

Our public interest organizations, Friends of the River, the Center for Biological Diversity, and the Environmental Water Caucus (EWC) (a coalition of over 30 nonprofit environmental and community organizations and California Indian Tribes) are concerned. We are concerned that employees, including scientists, of the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) may be pressured to alter or falsify Biological Opinions to be issued under the Endangered Species Act (ESA) with respect to the California Water Fix Delta Water Tunnels proposed project. This is an extremely serious matter. The constitutional responsibility of all members of the Executive Branch is to “take care that the laws be faithfully executed.” U.S. Constitution, Article II, Section 3. The ESA is one of our laws that must be faithfully executed.

The Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* The Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA. The reaches of the Sacramento River, sloughs, and the Delta that would lose significant quantities of freshwater flows through operation of the proposed Water Tunnels are designated critical habitats for each of these five listed endangered and threatened fish species.

“The ESA provides ‘both substantive and procedural provisions designed to protect endangered species and their habitat.’” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 596 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 948 and 950 (2015). Pursuant to the commands of Section 7 of the ESA, each Federal agency “shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . .” 16 U.S.C. § 1536(a)(2). “Actions” include “actions directly or indirectly causing modification to the land, *water*, or air.” 50 C.F.R. § 402.02 (Emphasis added). “ESA section 7 prohibits a federal agency from taking any action that is ‘likely to jeopardize the continued existence’ of any listed or threatened species or ‘result in the destruction or adverse modification’ of those species’ critical habitat.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 987 (9th Cir. 2015).

On October 30, 2015, the U.S. Environmental Protection Agency (EPA) gave the Supplemental Draft Environmental Impact Statement (SDEIS) for the project a rating of “3” (*Inadequate*).<sup>1</sup> The lead agencies for the project are the federal Bureau of Reclamation and California Department of Water Resources (DWR). Reclamation released a “working draft” of the Biological Assessment for the Water Fix Tunnels project on January 15, 2016. Reclamation now estimates it will complete the Biological Assessment and submit a request for formal consultation by May 2016. Reclamation states that “The [NMFS and USFWS] Services have

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<sup>1</sup> The EPA was hardly alone in its findings. The Delta Independent Science Board (DISB) Review found “the Current Draft sufficiently incomplete and opaque to deter its evaluation and use by decision-makers, resource managers, scientists, and the broader public.” (DISB Review, September 30, 2015, at 1, attached to Delta Stewardship Council October 27, 2015 comment letter).

targeted early September 2016 for issuance of the final BiOp for the California WaterFix Project.”<sup>2</sup>

The Delta Water Tunnels would divert enormous quantities of freshwater that presently flow through the Sacramento River, sloughs, and the Delta before being diverted for export from the south Delta. Due to the new points of diversion north of the Delta, freshwater flows that presently contribute to water quality, water quantity, fish, and fish habitat by flowing through the Delta would instead flow through massive Tunnels no longer providing benefits within the lower river, sloughs, and the Delta. *This is obvious.*

But Reclamation’s SDEIS actually claims there would be *no* adverse impacts under the National Environmental Policy Act (NEPA) from the Delta losing all that freshwater flow on water supply or water quality, or on fish and aquatic resources. (RDEIR/SDEIS Table ES-9, pp. ES-41-60; Appendix A, ch. 31, Table 31-1, pp. 31-3 through 31-8).<sup>3</sup> The BDCP/Water Fix Drafts are supposed to be environmental full disclosure documents. Whether from project-consultant bias or orders from above, it is false to claim that taking significant quantities of freshwater flows away from the Delta does not have significant adverse environmental impacts on Delta water supply, water quality, fish, and fish habitat. The freshwater *is* the water supply for the Delta and *is* the habitat for the endangered and threatened species of salmon and other fish.

The sole exceptions to the blanket denial of numerous and obvious adverse environmental impacts on water quality from the operation of the preferred Alternative 4A Water Tunnels are WQ-11 “effects on electrical conductivity concentrations resulting from facilities operations and maintenance,” and WQ-32 “effects on Microcystis Bloom Formation Resulting from Facilities Operations and Maintenance.” (RDEIR/SDEIS Appendix A, ch. 31, Table 31-1, pp. 31-3, 31-4). However, in the Executive Summary, even these two water quality impacts are not admitted to be adverse. (RDEIR/SDEIS Table ES-9, pp. ES-44, 45). Two tiny bits of truth survived in the Appendix but were eliminated from the Executive Summary.

Denial of the adverse impacts of taking freshwater flows away from the Delta for the Water Tunnels is absurd. Fish need water.

*That a federal agency, Reclamation, allowed issuance of the RDEIR/SDEIS filled with absurd refusals to admit, let alone analyze, obvious adverse environmental impacts on water quality and fish habitat is one of the circumstances causing us concern that politics and money are already interfering with science and the truth in the case of the Water Tunnels.*

As the EPA said in its August 26, 2014, review of the Draft Bay Delta Conservation Plan (BDCP) EIR/EIS:

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<sup>2</sup> Reclamation and DWR letter, February 25, 2016, to California Water Resources Control Board.

<sup>3</sup> The Drafts do selectively admit some significant adverse environmental impacts on other issues that pose less of a threat to the Water Tunnels even being a lawful, let alone reasonable, alternative.

Data and other information provided in the Draft EIS indicate that all CM1 [Tunnels project] alternatives may contribute to declining populations of Delta smelt, Longfin smelt, green sturgeon, and winter-run, spring-run, fall-run and late-fall run Chinook salmon. (EPA letter (p. 10). We recommend that the Supplemental Draft EIS consider measures to insure freshwater flow that can meet the needs of those [declining fish] populations and ecosystem as a whole, and is supported by the best available science. We recommend that this analysis recognize the demonstrated significant correlations between freshwater flow and fish species abundance. (*Id.*).

In 2013, NMFS reiterated its previous “Red Flag” comments that the Water Tunnels threaten the “potential extirpation of mainstem Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit. . . .” (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, Section 1.17, 12, April 4, 2013).

In April 2015, the claimed habitat conservation elements of the BDCP were dropped or drastically pared back in the switch from the BDCP to the “California Water Fix.” As just one example, the plan to provide “65,000 acres of tidal wetland restoration” was chopped down to merely “59 acres of tidal wetland restoration.” (RDEIR/SDEIS ES-17 (emphasis added)). Consequently, the current Water Tunnels project is *even more of a threat* to fish species and their habitat compared to the earlier versions that resulted in the concerns raised previously by the EPA and by NMFS scientists.

Here are a few examples of adverse environmental impacts of the Water Fix on fish and fish habitat as set forth in the California Department of Fish and Wildlife October 30, 2015 Supplemental Document comments on the Water Fix SDEIS. The new diversion “could substantially reduce suitable spawning habitat and substantially reduce the number of Winter-run as a result of egg mortality” with respect to the endangered Winter-run Chinook salmon. Moreover “there would be reductions in flow and increased temperatures in the Sacramento River that could lead to biologically meaningful reductions in juvenile migration conditions, thereby reducing survival relative to Existing Conditions.” Similarly, “there are flow and storage reductions, as well as temperature increases in the Sacramento River that would lead to biologically meaningful increases in egg mortality and overall reduced habitat conditions for spawning spring-run and egg incubation, as compared to Existing Conditions.” The Water Fix “could substantially reduce rearing habitat and substantially reduce the number of spring-run Chinook salmon as a result of fry and juvenile mortality.” With the Water Fix, “there would be moderate to substantial flow reductions and substantial increases in temperatures and temperature exceedances above thresholds in the Sacramento, Feather, and American Rivers, which would interfere with fall-/late fall -run Chinook salmon spawning and egg incubation. There would be cold water pool availability reductions in the Feather, American, and Stanislaus Rivers, as well as temperature increases in the Feather and American Rivers that would lead to biologically meaningful increases in egg mortality and overall reduced habitat conditions for spawning steelhead and egg incubation as compared to Existing Conditions.” With the diversion change, there would be flow reductions in five watershed Rivers “and temperature increases in

the Sacramento, Feather, American, and Stanislaus Rivers that would lead to reductions in quantity and quality of fry and juvenile steelhead rearing habitat relative to Existing Conditions.” The difference between Existing Conditions and the Water Fix “could substantially reduce suitable spawning habitat and substantially reduce the number of green sturgeon as a result of elevated exceedances above temperature thresholds.” Under the Water Fix, “there would be frequent small to large reductions in flows in the Sacramento and Feather Rivers upstream of the Delta that would reduce the ability of all three life stages of green sturgeon to migrate successfully.”

That is simply a longer way of saying that the fish need the freshwater flows and that Reclamation’s denial of the adverse impacts of taking yet more water away from their habitat is both false and absurd.

Reclamation and DWR have now marched along for over four years in the face of “red flags flying” deliberately refusing to develop and evaluate a range of reasonable alternatives, or indeed, any real alternatives at all, that would increase flows by reducing exports. Four years ago the National Academy of Sciences declared in reviewing the then-current version of the draft BDCP that: “[c]hoosing the alternative project before evaluating alternative ways to reach a preferred outcome would be post hoc rationalization—in other words, putting the cart before the horse. Scientific reasons for not considering alternative actions are not presented in the plan.” (National Academy of Sciences, Report in Brief at p. 2, May 5, 2011).<sup>4</sup>

*This persistent refusal to consider any true alternatives to the Water Tunnels is another circumstance contributing to our concern that this project is being governed by money and politics rather than by our laws.*

When the President first took office, it was said that “When he vowed in his inaugural Address to ‘restore science to its rightful place,’ President Obama signaled an end to eight years of stark tension between science and government.” (*Scientists Welcome Obama’s Words* by Gardiner Harris and William J. Broad, New York Times, January 21, 2009). That appeared to be a positive change in light of what had gone on before: “In early 2004, more than 60 influential scientists, including 20 Nobel laureates, issued a statement claiming that the Bush administration had systematically distorted scientific fact in the service of policy goals on the environment, health, biomedical research and nuclear weaponry.” (*Id.*). Of particular concern with respect to the Department of Interior and Reclamation, the subject article pointed out that “Just last month [December, 2008], the Inspector General of the Interior Department determined that agency

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<sup>4</sup> Our organizations have been calling on Reclamation to develop and consider alternatives to the Water Tunnels for years, including *A Sustainable Water Plan for California* (Environmental Water Caucus, May 2015). The EPA has recommended “that an alternative be developed that would, at minimum, not contribute to an increase in the magnitude or frequency of exceedances of water quality objectives, and that would address the need for water availability and greater freshwater flow through the Delta.” (EPA Letter, August 26, 2014, p.2). On July 16, 2014, the Army Corps of Engineers found that: “the EIS/EIR is not sufficient at this time in meeting the Corps’ needs under the National Environmental Policy Act (NEPA) . . . in particular with regard to the incomplete description of the proposed actions, alternatives analysis . . .” (Letter, p. 1).

officials often interfered with scientific work in order to limit protections for species in danger of extinction.” (*Id.*).

*This history of interference at Interior with scientific work to limit ESA protections for endangered species is yet another circumstance contributing to our concern that this project may be governed by money and politics rather than by our laws including the ESA.*

The definition of "scientific integrity" providing insulation from bias, falsification, interference, and censorship, and the prohibition of suppression and alteration are set forth in NOAA Administrative Order 202-735D on scientific integrity. If that Administrative Order is faithfully complied with, in both letter and spirit by everyone involved in ESA review of the Water Fix project, that would comply with Constitutional duties and honor the President's promise.

To summarize, the issuance by Reclamation of draft environmental documents for the Water Fix Tunnels that refuse to honestly admit, let alone analyze, obvious adverse environmental water quality and fish habitat impacts of taking away all that freshwater from the Delta; the persistent refusal by Reclamation to comply with NEPA by considering any true alternatives to the Water Tunnels; and the historic background of interference at Interior with scientific work to limit ESA protections for endangered species; all contribute to our concerns about suppression of NMFS and USFWS scientists who attempt to prepare accurate and honest Biological Opinions under the ESA for this frightfully destructive and wasteful project. We call upon you to ensure that our laws including the ESA be faithfully executed with respect to preparation of accurate and honest Biological Opinions for the Water Fix Water Tunnels project. That will also honor the President's promise to restore science to its rightful place in government. And, that would comply with NOAA Administrative Order 202-735D.

### ***Conclusion***

Extinction is forever. Accuracy and honesty in the upcoming Biological Opinions to be prepared by NMFS and USFWS scientists is imperative. False denials of jeopardy or of destruction or adverse modification of critical habitat are unacceptable.

If you have any questions, please contact Conner Everts, Facilitator, Environmental Water Caucus at (310) 394-6162 ext. 111 or Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or [bwright@friendsoftheriver.org](mailto:bwright@friendsoftheriver.org).

Sincerely,

/s/ E. Robert Wright  
Senior Counsel  
Friends of the River

/s/ Conner Everts  
Facilitator  
Environmental Water Caucus

/s/ Jeff Miller  
Conservation Advocate  
Center for Biological Diversity

Additional Addressees<sup>5</sup>, all via email:

*National Marine Fisheries Service:*

Eileen Sobek, Assistant Administrator for Fisheries  
Samuel D. Rauch, III, Deputy Assistant Administrator for Regulatory Programs  
Maria Rea, Assistant Regional Administrator  
Deanna Harwood, Office of General Counsel  
Garwin Yip, Water Operations and Delta Consultation Branch  
Cathy Marcinkevage, BDCP Branch  
Michael Tucker, Delta Policy and Restoration Branch

*U.S. Fish and Wildlife Service:*

Dan Ashe, Director  
Ren Loenhefener, Regional Director  
Kaylee Allen, Bay-Delta Fish and Wildlife Office  
Dan Castleberry, Assistant Regional Director, Fish and Aquatic Conservation  
Larry Rabin, Assistant Regional Director, Science Applications and Climate Change

*Bureau of Reclamation:*

David Murillo, Regional Director

*Environmental Protection Agency:*

Jared Blumenfeld, Regional Administrator, Region IX  
Tom Hagler, General Counsel Office  
Erin Foresman, Bay Delta Coordinator

*U.S. Army Corps of Engineers:*

Lisa Clay, Assistant District Counsel  
Michael Nepstad, Deputy Chief, Regulatory Division  
Zachary M. Simmons, Senior Regulatory Project Manager

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<sup>5</sup> The additional addressees are persons we have identified from organizational charts and/or persons we have been addressing our BDCP/Water Fix comment letters to for the past two years.